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Reports of Malaysian and Singapore Cases

DETERMINED BY

THE HIGH COURTS

AND BY

THE FEDERAL COURT

AND THE

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

OFFICIAL ASSIGNEE, STATES OF MALAYA v. TAT FATT SHIRTS MANUFACTURERS

[F.C. (Azmi C.J. (Malaya), Pike C.J. (Borneo) & MacIntyre F.J.) August 27, 1968]

[K.L. — Federal Court Civil Appeal No. X98 of 1967]

Sale of Goods — Consignment — Agents for sale — Bankruptcy of agents — Attachment of goods belonging to principal — Whether principal can recover goods — Reputed owner — Sale of Goods (Malay States) Ordinance, 1957, s. 24(b).

Bankuptcy — Agents for sale — Goods on consignment — Attachment of — Whether principal can recover goods — Bankruptcy Ordinance, 1959, s. 47.

The respondents had an agreement with a firm called Moghals for the supply of shirts to the latter on consignment for sale at certain premises in the occupation of Moghals. Under the agreement Moghals were to be paid a commission of 10% on all shirts sold and the respondents were at liberty to take back all unsold shirts at their absolute discretion.

Sometime in January 1967 the United Commercial Bank Limited (hereinafter called the bank) sued Moghals for a considerable sum of money and obtained an order of attachment before judgment against Moghals. In March 1967 the bank obtained a receiving and adjudication orders against the partners of Moghals. The goods at the premises occupied by Moghals were seized by the sheriff in consequence of the order for attachment. In May 1967 the respondents applied for the return of the shirts which they had supplied to Moghals under the agreement and which were among the articles seized by the sheriff.

Held, allowing the appeal: (1) the shirts in the present case were handed to Moghals for the purposes of sale to other people. It was never intended that Moghals should buy the shirts themselves and therefore Moghals were simply agents for sale;

(2) as the act of bankruptcy preceded the seizure of the goods by the sheriff and was committed within 6 months of the receiving order being made, the goods were in the possession, order or disposition of the bankrupt (who had left the State before the attachment of the goods) with the consent and permission of the true owners under such circumstances that he was the reputed owner of the goods.

[**Editorial:** Section 47 of the Bankruptcy Ordinance, 1959 is re-enacted as section 47 of the Bankruptcy Act, 1967 (No. 55).]

Cases referred to:—

(1) *Hardy & Co.* v. *Hillerens & Fowler* [1923] 2 K.B. 490.

(2) *Kirkham* v. *Attenborough* [1897] 1 Q.B. 201.

(3) *London Jewellers Ltd.* v. *Attenborough* [1934] 2 K.B. 206.

(4) *In re Ferrier, Ex parte The Trustee* v. *Donald* [1944] Ch. 295.

(5) *Weiner* v. *Harris* [1910] 1 K.B. 285.

FEDERAL COURT.

H. Elias for the appellant.

Y. S. Lee for the respondents.

Cur. Adv. Vult.

Azmi C.J. (Malaya): This is an appeal by the Official Assignee against the decision of the High Court at Kuala Lumpur which held that certain shirts originally found on certain premises should be returned to the respondents Messrs. Tat Fatt Shirt Manufacturers.

The premises were at the material time in the occupation of a firm known as Moghal's, comprising of two partners named Mohamed Said Butt and Mohamed Anwar Beg Moghal.

According to the respondents, the firm, which I shall refer to subsequently as Moghal's had been obtaining various brands of shirts on credit from the respondents but in view of the failure of Moghal's to settle its debts regularly, Moghal's and the respondents on 1st September 1966 signed a document marked Exhibit C.1, under which it was agreed between the two of them that the respondent would supply Moghal's with shirts "on consignment" on the following terms:—

(a) that Moghal's would be paid a 10% commission on all shirts it sold.

(b) that accounts should be taken once every four months.

(c) that the respondents were at liberty to take back all unsold stock at their absolute discretion at any time.

(d) that the respondents would deduct 75 cents out of each dollar from the commission due to Moghal's in payment of Moghal's outstanding account with the respondents.

(e) this arrangement would be good for a year only.

On 3rd January 1967, the United Commercial Bank Ltd. took out a specially endorsed writ against Moghal's for a claim of $398,295.61.

On the ground that it was not possible to serve the writ after all practical means of effecting personal service have been exhausted, and prompt personal service would appear impossible, the court on 7th January 1967 ordered that service of the writ on the firm and the notice to the person having control or management of the firm be made by an advertisement in two local newspapers.

Other creditors had also brought actions against the firm and one of them obtained an order of attachment before judgment on 23rd December 1966. The United Commercial Bank Ltd. also obtained a similar order on 4th January 1967.

In both instances the application for attachment before judgment was based on the allegation that the defendants had left Malaysia and that the manager in charge of the firm had also disappeared.

On 27th March 1967, the United Commercial Bank Ltd. obtained a receiving and adjudicating order against a partner of Moghal's, Mohamed Anwar Beg Moghal. It was also alleged in the petition that the said Mohamed Anwar Beg Moghal with intent to defeat and delay his creditors had left and had remained outside Malaysia.

On 19th May 1967, the respondents applied for the return of certain shirts, among the goods seized by the sheriff in consequence of the order of the court to which I had previously referred, on the ground that these shirts belonged to them under the terms of the agreement C.1.

The learned judge was of the view that the matter resolved into two questions, namely:—

(1) Whether the ownership of the said shirts remained with the respondents as from 1st September 1966?

(2) Whether the case came within the doctrine of reputed ownership?

In reference to the first question, the learned judge put it thus:—

"The new arrangement has all the earmarks of a conditional sale and I think it is clear that the provisions of section 24 of the Sale of Goods Ordinance 1957 applies unless a different intention appears. It contemplates that all shirts sold by Moghal's are to be taken to mean that they have "adopted" the transaction. Property therein passes to them as by their sale they put it out of their power to return them. The mode of payment is but an ancillary part of the new arrangement. In respect of shirts still in stock, and this is the subject of the present action, the goods will only pass as soon as Moghal's have exercised the option within a reasonable time, e.g. by sending goods to a sub-purchaser: see *Hardy & Co.* v. *Hillerens & Fowler*,[1] or by re-selling or pledging them; see: *Kirkham* v. *Attenborough* [2] *London Jewellers Ltd.* v. *Attenborough*.[3] It is not in doubt that Moghal's "retained" the goods within the meaning of section 24(b) of the Ordinance until 23rd December 1966 when the goods were seized under the execution. From that date the goods were "retained" by the sheriff, and since 4th April 1967 by the official assignee. The event contemplated by section 24(b) had not happened. Moghal's had no opportunity to exercise the option which I consider still remained to them at the date on which the seizure took place which renders it impossible for them to exercise that option and so to have the whole benefit of their bargain. In my view, the goods simply remained goods which had been delivered on sale or return and which never became their property."

In support of his judgment the learned judge referred to *In re Ferrier Ex parte The Trustee* v. *Donald*.[4] The facts of the case would appear to be as follows: On November 11th, 12th and 13th 1941, Mrs. Donald, who carried on business as a dealer in antique furniture delivered certain articles of furniture to Mrs. Ferrier on sale for cash or return within a week. On 15th November 1941 execution was levied on the goods of Mrs. Ferrier and the articles delivered by Mrs. Donald were among the goods seized. On 3rd December 1941 the sheriff interpleaded and on 8th December Mrs. Donald made an affidavit in which she claimed the articles on the ground that they had been *bona fide* delivered to Mrs. Ferrier on sale for cash or return within a week. On 16th December 1941, the master in chambers heard the interpleader issue and ordered the sheriff to withdraw from possession of the articles claimed by Mrs. Donald, who recovered possession of them. On 31st March 1942, a receiving order was made against Mrs. Ferrier and on 24th April 1942 she was adjudicated a bankrupt and a trustee for her estate was appointed. The trustee relying on section 18 r. 4(b) of the Sale of Goods Act 1893 applied to the court for a declaration that on 20th November 1941 the property in the articles became and was vested in Mrs. Ferrier and at all material times remained so vested. The matter came before Morton J. and he, however, did not take the view that Mrs. Ferrier held the goods until 20th November 1941 (within a week after 15th) within the meaning of section 18, but that she retained them until 15th November 1941 when the goods were seized by the sheriff under the execution and that from that time the goods were retained by the sheriff.

The point emphasized by Raja Azlan Shah J. was that the seizure was wrong because the articles had not been retained by Mrs. Ferrier within the meaning of section 18 r. 4(b) of the English Sale of Goods Act 1893 (which was in *pari materia* with section 24(b) of our Ordinance) and had never become her property and that Mrs. Ferrier did not retain the goods within the meaning of the section after the seizure of the goods under the execution.

I would like to point out here that in *Ferrier's* case, it was not disputed that Mrs. Ferrier intended to purchase the articles herself.

Mr. Elias before us urged that Raja Azlan Shah J. was wrong in deciding the question as he did, because the facts of the case were different. Mr. Elias urged that in our present case, the proper question to be decided was whether Moghal's held the shirts on a "sale or return" basis within the meaning of our section 24(b) of the Sale of Goods Ordinance, or whether Moghal's was only an agent of sale. He was of the view that Moghal's was merely an agent and the goods were held by the firm as an agent of sale of the respondents. In support he cited the case of *Weiner* v. *Harris*.[5] In that case, the plaintiff, a manufacturing jeweller was accustomed to send articles of jewellery to one Fisher, a retail jeweller for sale on the terms of a letter written by Fisher to the plaintiff in which Fisher acknowledged in a document signed by him and left with the plaintiff that he had the goods on a "sale or return" basis and that he, Fisher, was liable to account to the plaintiff for such goods and in that letter further stated as follows:—

> "The goods referred to in the book mentioned are your property and to remain so until sold or paid for, they being only left with me for the purpose of sale or return and not be kept as my own stock. The goods I receive from you are to be entered at cost price and my remuneration for selling them is agreed at one half the profit."

Fletcher Moulton L.J. at page 293 says this:—

> "The ordinary case of the use of the words 'sale or return' is when the goods are entrusted to the prospective buyer on sale or return, and there it means sale to him. He is either to be the buyer or he is to return them. But so far as the literal meaning of the words in concerned, they are applicable to a case where a man says 'I have delivered these goods to my selling agent on sale or return if he does not sell them, he is to return them, but he is not intended to buy them.' In my opinion this letter uses 'sale or return' in the latter sense. It obviously refers to a sale by Fisher and not a sale to Fisher."

Moulton L.J. after referring to certain expressions used in the letter went on to say:—

> "It was never contemplated by the parties to the arrangement that Fisher should be the buyer. Therefore, in my opinion, Fisher is simply an agent for sale."

I am inclined to agree with Mr. Elias that based on the argument of Fletcher Moulton L.J. the shirts in the present case were handed to Moghal's for the purpose of sale to other people. It was never intended that Moghal's should buy the shirts itself, and it would appear to me therefore that Moghal's was simply an agent for sale.

I would next consider the question whether the shirts in question were the property of the bankrupt divisible among his creditors under section 48 of the Bankruptcy Ordinance 1959 on the ground that these shirts were at the commencement of the bankruptcy in the possession, order or disposition of the bankrupt by consent and permission of the true owner under such circumstances that he is the reputed owner thereof.

The learned judge held the view that in this case the sheriff seized the goods on 23rd December 1966 and that, in his view, being the first act of bankruptcy, it could not therefore be said that the shirts were in the possession of the bankrupt at the commencement of his bankruptcy.

Before I go further, I should I think, refer to the provisions of section 47(1) of the Ordinance which provides that the bankruptcy of a debtor shall be deemed to have relation back to and commence at the time of the act of bankruptcy being committed on which a receiving order is made against him, or if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to and to commence at the time of the first act of bankruptcy proved to have been committed by the bankrupt within six months next preceding the date of the presentation of the bankruptcy proceedings.

In this matter the bankruptcy petition was presented on 31st January 1967 and the alleged act of bankruptcy put forward in that petition was that Mohamed Anwar Beg Moghal, a partner of Moghal's, with intent to defeat or delay his creditors had left the States of Malaysia and had remained out of the States of Malaysia. There is no means of knowing on the facts before us when Mohamed Anwar Beg Moghal actually left this country but he had certainly left before the sheriff attached the goods in question and has continued to remain outside Malaysia and in my view, the act of remaining outside Malaysia being a continuing act, it would therefore follow that that act of bankruptcy preceded the seizure of the goods by the sheriff, and was committed within six months of the receiving order being made. In my view having regard to the facts of the case the goods were therefore in the possession, order or disposition of the bankrupt with the consent and permission of the true owner under circumstances, that he was the reputed owner of the goods.

I would therefore hold that these shirts are the property of the bankrupt within the meaning

of section 48 of the Ordinance and distributable among his creditors. The appeal is therefore allowed and the judgment of the learned judge set aside. The respondent will pay the costs here and in the court below.

Pike C.J. (Borneo) and **MacIntyre F.J.** concurred.

Appeal allowed.

Solicitors: *Shearn Delamore & Co.; Lee Yew Siong.*

PUBLIC PROSECUTOR v. ONN

[R.Cr.J. (Ali J.) September 2, 1968]
[Johore Bahru — Criminal Revision No. 3 of 1968]

Criminal Law and Procedure — Revision — Bond — Whether bond ordered under Criminal Procedure Code (Cap. 6), s. 173A can contain conditions under s. 294A.

The accused was tried by the magistrate, Johore Bahru under section 380 of the Penal Code. The magistrate though finding the charge proved proceeded to exercise his powers under section 173(ii)(b) of the Criminal Procedure Code and imposed the conditions provided in section 294A of the Code. The deputy public prosecutor drew the attention of the learned judge in revision that the conditions of the bond which the accused was ordered to execute were illegally imposed.

Held: the conditions provided in section 294A of the Criminal Procedure Code are not applicable to a bond ordered under section 173A of the Code and accordingly there should be an order that the offensive conditions be omitted.

CRIMINAL REVISION.

Fong Seng Yee (Deputy Public Prosecutor) for the applicant.

Respondent absent — notice served.

Ali J.: The record of this case was called at the instance of the learned deputy public prosecutor who was of the view that an error in law appearing in the order made by the trial magistrate be corrected under the revisionary powers of the court.

The accused was tried by the magistrate, Johore Bahru, on a charge under section 380 of the Penal Code for stealing in a dwelling house 2¼ yards of cloth. At the conclusion of the case the trial magistrate, though finding the charge proved, proceeded to exercise his powers under section 173A(ii)(b) of the Criminal Procedure Code. Whether or not this power should be exercised having regard to the accused's past record, which was disclosed at the trial, does not, however, come up for consideration here. The learned deputy public prosecutor has drawn my attention to this matter solely on the ground that the conditions of the bond, which the accused was ordered to execute, were illegally imposed. The record of this case clearly shows the terms of the order which, as expressed in the National Language, are these:—

"Di-ikat jamin di-bawah sekshen 173A(ii)(b) Kanun Peratoran Jenayah dengan $300 1 penjamin selama 2 tahun dan tertaklok pada sharat[2] yang di-buat di-bawah sekshen 294A Kanun Peratoran Jenayah (lihat Nota Penyaksian)."*

Further down the record the trial magistrate specified the conditions which are as follows:—

"(1) Di-kawal oleh saorang Pegawai Akhlak dalam tempoh jaminan itu.**

(2) Tidak di-benar berkawan atau berchampor atau bersama dengan orang[2] yang di-tudoh ada sebab[2] untok mengetahui atau memperchayai telah di-thabitkan atas kesalahan menchuri atau kesalahan[2] yang saumpama dengan menchuri."***

Simply stated the learned deputy public prosecutor's contention in his letter to me was that the two conditions, being conditions set out in section 294A, are inapplicable to a bond ordered under section 173A(ii)(b). One of the reasons given, which I do not consider to be strong enough, was that section 294A appears in the same Chapter as section 294, and that this Chapter is concerned only with the carrying out of sentences after conviction. I prefer to approach this problem in this way. Section 173A is clear in terms that when power is to be exercised the court shall not proceed to conviction. The record clearly suggests that the trial magistrate was aware of this. Since sentence follows conviction it must, therefore, be the intention of the Legislature that whenever a bond is ordered under this section, nothing which savours of a form of punishment should be inflicted upon the offender. A condition requiring the offender to be of good behaviour in paragraph (b) has no punitive effect inasmuch as it merely enjoins the offender to behave like any other law-abiding citizen. But the same cannot be said of the two conditions which were included in the bond. These conditions, which are clearly of the nature set out in section 294A, require not only that the offender be placed under the supervision of a probation officer for a defined period, but also prohibit him from associating with certain persons. Both have punitive effects in so far as they impose a certain amount of restraint on the offender either as regards movements or as regards free choice of companions. In other words, the freedom or liberty of the individual must certainly be affected by these conditions. Any sentence of a court of law necessarily affects the liberty or freedom of the individual. Section 294A contains conditions which are all punitive in effect

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* Ordered to enter into a bond under section 173A(ii)(b) of the Criminal Procedure Code with $300 one surety for two years and subject to the conditions made under section 294A of the Criminal Procedure Code (see Notes of Evidence).

** Be under the supervision of a Probation Officer during the period of the bond.

*** Not allowed to have friends or associate or be with persons who the accused has reason to know or believe to have had previous conviction for theft or offences of similar nature.